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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH ADRIAN FULLER,

Defendant and Appellant.

A127226

(Sonoma County  
Super. Ct. No. SCR537091)

In 2008, defendant Kenneth Adrian Fuller pleaded no contest to receiving stolen property (Pen. Code, § 496, subd. (a)), execution of a three-year-prison sentence was suspended, and he was granted probation. In October 2009 he was found to have violated probation,<sup>1</sup> and the three-year sentence was executed in December 2009. He received 193 days of presentence credit, consisting of 129 actual days in custody, and 64 days of conduct credit. Defendant contends that he is entitled to 64 additional days of conduct credit under amendments to Penal Code section 4019<sup>2</sup> that took effect on January 25, 2010, while his appeal was pending.<sup>3</sup> We agree, and modify the judgment to award defendant the additional credit he seeks.

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<sup>1</sup> Defendant had previously violated probation; we affirmed the order reinstating him on probation in *People v. Fuller* (Sept. 30, 2009, A124762) [nonpub. opn.].

<sup>2</sup> All further statutory references are to the Penal Code.

<sup>3</sup> Under section 1237.1, a defendant must first raise “an error in the calculation of presentence custody credits” in the trial court. (See *People v. Acosta* (1996) 48 Cal.App.4th 411, 427 (*Acosta*) [statute applies when the right to such credits is the sole issue on appeal].) We will assume for purposes of this opinion that the legal issue

## I.

Under former section 4019, subdivisions (b), (c), and (f), defendants were eligible for two days of conduct credit for every four days in custody; under those subdivisions as amended in January 2010, certain defendants are eligible for two days of conduct credit for every two days in custody. (See *People v. Norton* (2010) 184 Cal.App.4th 408, 414 (*Norton*).) The amendments thus essentially doubled the available credits. (*Ibid.*) It is not disputed that defendant is entitled to the additional credit he seeks if the section 4019 amendments apply retroactively to prisoners like him who were sentenced before the amendments took effect, but whose judgments were not final on the effective date.

## II.

Courts have split on this issue. Cases holding that the amendments apply retroactively include: *People v. Bacon* (2010) 186 Cal.App.4th 333, 336 (*Bacon*); *People v. Keating* (2010) 185 Cal.App.4th 364, 369 (*Keating*); *People v. Pelayo* (2010) 184 Cal.App.4th 481, 485 (review granted July 21, 2010, S183552) (*Pelayo*); *Norton, supra*, 184 Cal.App.4th at p. 411; *People v. Delgado* (2010) 184 Cal.App.4th 271, 282; *People v. Landon* (2010) 183 Cal.App.4th 1096, 1099 (review granted June 23, 2010, S182808) (*Landon*); *People v. House* (2010) 183 Cal.App.4th 1049, 1052 (review granted June 23, 2010, S182813); *People v. Brown* (2010) 182 Cal.App.4th 1354, 1363–1364 (review granted June 9, 2010, S181963). These cases represent the majority view. (*Bacon, supra*, 186 Cal.App.4th at p. 336; *Keating, supra*, 185 Cal.App.4th at p. 383.)

Cases taking the minority view that the amendments do not apply retroactively include: *People v. Eusebio* (2010) 185 Cal.App.4th 990, 991–992; *People v. Hopkins* (2010) 184 Cal.App.4th 615, 619 (*Hopkins*); *People v. Otubuah* (2010) 184 Cal.App.4th 422, 432 (review granted July 21, 2010, S184314); and *People v. Rodriguez* (2010) 183 Cal.App.4th 1, 5 (review granted June 9, 2010 (S181808)).

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presented here does not involve a “calculation” error within the meaning of section 1237.1, and may thus be addressed for the first time on appeal. (See *Acosta, supra*, at p. 422 [statute concerns ministerial “ ‘[c]orrection of clerical or mathematical error’ ”].)

### III.

As the split of authority would imply, good arguments can be marshaled on both sides of the issue. The arguments have been thoroughly addressed in the reported cases, and no purpose would be served by another extended discussion of them. On the one hand, among other things, criminal statutes are presumed to operate prospectively (§ 3), the legislation amending section 4019 did not state that those amendments were retroactive, and the fact that the Legislature provided for retroactivity in another part of the legislation that increased other credits suggests a contrary intent with respect to the section 4019 amendments (*Hopkins, supra*, 184 Cal.App.4th at pp. 625–626). On the other hand, among other things, statutory amendments lessening punishment are generally retroactive (*In re Estrada* (1965) 63 Cal.2d 740, 745), and the section 4019 amendments lessen punishment by shortening prison sentences (*Norton, supra*, 184 Cal.App.4th at pp. 417–418).

We are persuaded on balance by the arguments favoring retroactive application of the amendments, a conclusion consistent with the reported cases from this Appellate District (*Pelayo, supra*, 184 Cal.App.4th 481 (Div. Five); *Norton, supra*, 184 Cal.App.4th 408 (Div. Three); *Landon, supra*, 183 Cal.App.4th 1096 (Div. Two)), and with the legislation’s stated aim of “address[ing] the fiscal emergency declared by the Governor” (Stats. 2009–2010, 3d Ex. Sess. 2009, ch. 28, § 62).

### IV.

The judgment is amended to award defendant 128 days of credit under section 4019 and, as so amended, the judgment is affirmed. The trial court is directed to prepare and forward an amended abstract of judgment reflecting the modification to the Department of Corrections and Rehabilitation.

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Marchiano, P.J.

We concur:

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Margulies, J.

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Banke, J.